Supreme Court, U. S.
FILED
OCT 12 1974
MICHAEL RODAK, JR., CLERK

Nos. 74-165, 74-167 and 74-168

IN THE

Supreme Court of the United States

October Term, 1974

UNITED STATES OF AMERICA, et al.,
Appellants in No. 74-168,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, PENN CENTRAL COMPANY, et al.,
Appellees.

UNITED STATES RAILWAY ASSOCIATION,
Appellant in No. 74-167,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, PENN CENTRAL COMPANY, et al.,
Appellees.

ROBERT W. BLANCHETTE, RICHARD C. BOND AND JOHN H. McARTHUR AS TRUSTEE OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR,
Appellants in No. 74-165,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, PENN CENTRAL COMPANY, et al.,
Appellees.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

REPLY BRIEF FOR APPELLEE PENN CENTRAL COMPANY.

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REPLY BRIEF OF APPELLEE PENN CENTRAL COMPANY.

Appellee Penn Central Company submits this Reply Brief in further support of the Order of the three-judge court in *Connecticut General Insurance Co. et al. v. United States Railway Association, et al.*, C. A. Nos. 74-189, 74-1107, 74-1149 (E.D. Pa. dated June 25, 1974).

ARGUMENT.

Penn Central Company wishes to emphasize to the Court the unique position which it occupies both in these reorganization proceedings and in connection with the question of interim erosion which bears so heavily upon the recent decision of the Special Court in *In the Matter of Penn Central Transportation Company, No. 74-8* (decided September 30, 1974).

The Special Court, pursuant to Section 207(b) of the 1973 Regional Rail Reorganization Act, is authorized to review the Section 207(b) findings of the Reorganization Court as to the fairness and equity to the estate of the processes provided by the Act for the reorganization of the debtor railroads. In this instance, the Special Court reversed the findings of Judge Fullam and held that the Act did indeed provide a process which would be fair and equitable to the estate of Penn Central. Primarily, the court rested its decision upon its conclusion that the remedies provided for by the Tucker Act, 28 U.S.C. § 1291, would be available to creditors and shareholders of Penn Central to compensate for any interim erosion which takes place and for any deficiencies which might result if Council is ultimately unsuccessful. As such, the Special Court reversed the lower court's decision and stayed its mandate pending the determination of the instant proceedings by this Court.

Penn Central Company is the parent holding company of the Penn Central Transportation Company, owner of 100% of the stock in the Transportation Company, an unsecured creditor of the Transportation Company in the approximate amount of $41.8 million, and is the representative in the reorganization proceedings of approximately 160,000 shareholders. As the equity owner of Penn Central Transportation Company and as an unsecured creditor,

Penn Central Company's interests in the Debtor's estate are the first to feel the effects of any erosion of assets. The impact of the erosion which has already occurred upon the shareholders' interests, as the figures cited below clearly demonstrate, has been substantial.

As early as January 1, 1973, the Trustees of the Penn Central Transportation Co. indicated, in unambiguous terms, the damaging effect of continuing erosion upon the assets and future operations of the railroad were of such magnitude that:

> ". . . the value of the estate has already been substantially eroded and the trustees are presently unable to prevent continuing erosion . . .
>
> "There is, simply, not enough cash to cope with continuing claims and to embark upon the capital improvements program which would permit a continuation of service improvements. Not only is the ability to preserve earning power jeopardized, but Penn Central's essential public services cannot be sustained on this basis.
>
> "The Trustees conclude that further progress can reasonably be expected in the direction of satisfying the conditions to reorganization, but that the evidence does not support the hope that such progress will be fast enough to prevent the erosion of the estate in which claimants have undeniable constitutional rights, and the ultimate deterioration of the property." Trustees' Interim Report of January 1, 1973, p. 4 (Doc. No. 4911), cited in *Connecticut General Insurance Corp. v. United States Railway Association* (J. A. p. 39).

It should be emphasized that on June 21, 1970, the date upon which the Penn Central entered bankruptcy, shareholders' equity in the estate was quite substantial, totalling

approximately $1,666.6 million (Penn Central Transportation Co., Balance Sheet of June 21, 1973, Doc. No. 218). However, as of January 1, 1973, the date of the Trustees' above-quoted remarks, that same equity had been cut almost in half to approximately $856.7 million (Trustees' Statement of Assets and Liabilities of Debtor as of December 31, 1972). As of January 2, 1974, the date on which the Regional Rail Reorganization Act of 1973 was enacted into law, shareholders' equity had shrunk to approximately $684.1 million (Trustees' Statement of Assets and Liabilities as of December 31, 1973). Thus, interim erosion had, by this time, made inroads into that equity of approximately $980 million between the date the petition for reorganization was filed and the passage of the Act.

Up until the issuance of the Trustees' Report of January 1, 1973, it could have responsibly been asserted that the rights of creditors to dispose of their property should be suspended to permit the development of a feasible plan of reorganization under the teaching of *Continental Illinois Nat'l. Bank & Trust Co. v. Chicago, R.I. & P. Ry.*, 294 U.S. 648 (1935). However, once the findings of the Trustees were made known, the likelihood of successful future reorganization under §77—the sole justification for delaying the exercise of creditors' rights—virtually ceased to exist. From that date forward, it is apparent that continued rail operations were carried out solely for the benefit of the public interest, that costs of continuing erosion were impermissibly imposed upon creditors and shareholders alike, and that the widely-accepted teachings of *Brooks-Scanlon Co. v. Railroad Commission*, 251 U.S. 396 (1920), and its progeny, were being ignored and the rights of plaintiffs were being subjugated to the interests of the public.

In conjunction with the balance sheet figures and the statements of the Trustees is the fact that on February 8, 1973—after the Trustees' Report had made clear that a successful reorganization was impossible—Congress enacted, and the President of the United States thereafter approved, Senate Joint Resolution 59 which required the Transportation Company to continue to provide rail operations under existing conditions, in the public interest, despite the clear certainty that such a continuance of operations would result in substantial operating deficits and concomitantly, a resultant depletion of the stockholders' equity.*

Subsequent to the Senate Joint Resolution, Congress passed and the President signed the 1973 Regional Rail Reorganization Act which again mandated continued rail operations for an indefinite period of time despite the already substantial losses which had been previously borne by the shareholders and creditors of the estate. Needless to say, as plaintiff has demonstrated in its Brief as Appellee, the 1973 Act fails to provide just compensation for that interim erosion as is required by the Fifth Amendment, despite almost universal recognition that the payment of such compensation is indeed required.

It is apparent that the interests of Penn Central Company and the individuals it represents have been severely damaged by governmental actions requiring the Transportation Company to continue deficit operations even after all likelihood of successful reorganization had vanished. As a result, shareholders of Penn Central have been forced to absorb crippling and unconstitutionally inflicted losses within a relatively short period of time. The Special Court decision completely ignored this ominous state of affairs. Furthermore, if the Special Court, in its opinion, intended

* Penn Central Company has initiated litigation in the United States Court of Claims to recover damages for the unconstitutional taking of its property for the period commencing February 8, 1973 and for the period commencing January 2, 1974 to the present. *Penn Central Co. v. United States of America*, Doc. No. 129-74, United States Court of Claims, filed April 10, 1974.

to imply that the shareholders did not retain any equity in the Debtor's estate as of January 2, 1974, such an implication is clearly erroneous. There was and is no evidence in the record which would support such a finding. Indeed, the evidence, as noted above, clearly indicates that the shareholders' equity as of that date totalled $684.1 million. As such, this Court is respectfully requested to give special heed to the position of Penn Central Company and its shareholders in this reorganization process and to recognize the inequitable manner in which interim erosion and the entire 1973 Rail Act affects the constitutionally protected interests of Penn Central Company in the Debtor's estate.

CONCLUSION.

For all of the reasons stated above and in its Brief as Appellee filed with the Court in this action, it is clear that the equity interests of Penn Central Company as shareholders and unsecured creditors in the estate of the Debtor have been substantially and unconstitutionally eroded by the actions of the government in requiring continued, uncompensated deficit rail operations for the public benefit. Therefore, appellee Penn Central Company respectfully requests that the Order of the three-judge court dated June 25, 1974, enjoining the United States Railway Association from certifying a Final System Plan pursuant to Section 209(c) of the Act, enjoining defendants from taking any action to enforce the provisions of Section 304(f) of the Act, enjoining all parties from enforcing or implementing portions of Section 207(b), declaring Section 303 of the Act null and void, declaring Section 304(f) of the Act null and void, and declaring portions of Section 207(b) null and void be affirmed.

Respectfully submitted,

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